1979

State of Utah v. Charles Steven Archuletta : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -v- CHARLES STEVEN ARCHULETTA, Defendant-Appellant.	:	Case No. 15919

BRIEF OF APPELLANT

Appellant appeals from a jury verdict of guilty of Forcible Sodomy in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Jr., Judge presiding.

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	:	
Plaintiff-Respondent,		
	:	
-v-	:	
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, CHARLES STEVEN ARCHULETTA, appeals from a conviction of Forcible Sodomy in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, CHARLES STEVEN ARCHULETTA, was charged with Rape, a Felony of the Second Degree, in violation of Utah Code Ann. §76-5-402 (1953 as amended) and Forcible Sodomy, a Felony of the Second Degree in violation of Utah Code Ann. §76-5-403 (1953 as amended). At jury trial appellant was acquitted of the charge of Rape, but found guilty of the charge of Forcible Sodomy. Appellant was sentenced to the Utah State Prison for the indeterminate term of one to fifteen years for that conviction.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judg-

ment rendered below and a remand of the case to the Third Judicial District Court for a new trial.

STATEMENT OF THE FACTS

The State alleged that Michelle Christiansen was raped by appellant on September 27, 1977, and that shortly thereafter was forced to engage in sodomy with him at an apartment somewhere on the east side of Salt Lake City. Seventeen year-old Michelle Christiansen testified at trial that at approximately 5:30 or 6:00 p.m. on the evening of the 26th of September, 1977, while riding with three of her female friends in the area of 600 South and 900 East in Salt Lake City, she, along with the others, engaged in a conversation with appellant while he was driving another car going the same direction. She testified that the appellant asked herself and her friends if they all wanted to go to a party, and they agreed. Appellant drove his truck to the location of the party and rode with the girls to one Diana Visick's house to change into other clothing. Michelle and Lisa Don Thornwall drove appellant back towards the party in Diana's car. Along the way they stopped at a grocery store to buy beer. Michelle testified that at the party she, along with the others, drank beer and that there was marijuana being smoked.

A while later Lisa Don, the appellant, and Michelle agreed to leave the party and drove to Gerrard Avenue, a location one block behind the State Capitol Building, where the three of

them sat in the car for a considerable period of time, talking and drinking beer (T. 19,38). Some time after the three individuals had been parked at Gerrard Avenue, all three individuals took a pill or capsule. Michelle also testified that she had consumed two to two and a half beers, maybe (T. 39). The three sat for a while longer talking. During this time appellant kissed Lisa (T. 20) and also Michelle. They then decided to leave Gerrard Avenue. Lisa Don decided that she wanted to go home (T.20). She dropped Michelle and appellant off at the appellant's mother's place. Appellant indicated he would be meeting with his sister to get a car and that he could take Michelle home after they had gone out to eat breakfast (T. 21).

After a few minutes when the car had not arrived, Michelle asked to use the lavatory and the appellant walked with her around the corner to another apartment. He let her in the apartment, she used the bathroom, and the appellant indicated he was going to see if his sister was back with the car (T. 22). The prosecutrix testified that she then passed out (T. 23) and that she doesn't remember anything until she saw appellant standing by the doorway. She testified that she got up off the couch (T.23) where she had been asleep and walked over to where he was. He asked her to sit down and she did. He began to rub her back. The prosecutrix then testified that appellant rubbed her back, took her shirt off, and rubbed her back with lotion. He later took off her blue jeans, her underwear and her shoes and continued rubbing her body. She testified this made her feel relaxed. During this time the prosecutrix

made no effort to prevent him from doing so. After some time prosecutrix testified that they began to have intercourse (T. 25).

After a while the prosecutrix testified that she attempted to get up and appellant rolled her over and asked her to perform oral sex. She testified that she said she wanted to go home (T. 26). She then testified that appellant asked her again to do it for him and that, although she tried to put up resistence, she was unable to (T. 26). She further testified that appellant started to put a Mikelob beer bottle inside of her but that she grabbed his arm and told him to stop and then "I told him I'd do what he wanted me to and so then I tried to do it for him" (T. 27). She testified she told him she loved him (T. 28) and that she performed this act for about an hour (T. 54). She also testified that when they were finished, she asked him to take her out to breakfast again (T. 29). After a while they went into the other room and fell asleep.

The prosecutrix testified that when she woke up she was in bed, she put on her clothes and ran out of the house for three blocks. She made contact with an individual and asked to use the phone and immediately called her mother. At her father's suggestion, they decided to call the police (T. 30).

The State presented testimony that Michelle Christiansen was taken to the hospital where the examining doctor found no evidence of sexual intercourse. At the hospital urine and blood samples were also taken from Michelle Christiansen. The blood

and urine were tested for the presence of trichloral ethanol, a metabolite of chloral hydrate. Trichloral ethanol was found in the urine and was found in the blood at the level of 6.1 micrograms per millileter. State's witness Brian Finkle testified that a level of 6.1 micrograms per millileter of trichloral ethanol in the blood would have indicated to him that there "must have had a blood concentration prior to that time very much higher and, indeed, much higher than anyone in my experience would achieve had they been prescribed this drug by a physician for medical purposes" (T. 104). This fact, however, is only true when the blood and the testing is kept under controlled circumstances which was not the case in the this instance.

State's witness Ladislav Kopjak, chemist at the Center for Human Toxicology, University of Utah, testified (T. 94) that "because the drug trichloral ethanol is a volatile-type substance, such as alcohol, and if it's not refrigerated there is a chance that it could seep out from the vial and the tubes". Therefore, "The effect would be that the concentration that I reported in the blood would most likely have been higher because it was not refrigerated".

Testimony from State's witnesses Pat Smith and Nurse McClintick (T. 77,78) indicated that viles had not been refrigerated between the period from the 27th of September, 1977, to some time after 3:45 p.m. on the 29th of September, 1977. Those combined facts showed that the reliability of the tests con-

ducted, concerning the level of trichloral ethanol, were not all together established. The prosecutrix testified that during the time of the intercourse and oral sex she felt sleepy, tired and slightly dizzy. State's witness Lisa Don Thornwall, who also consumed a green capsule, testified she suffered no noticable effects from the capsule (T. 158).

Appellant expressed concern about prosecutrix the next morning when he telephoned Diana Visick (T. 143) and offered to help try to find "Shelly" (T. 143). Appellant was arrested without resistance and was described as cooperative at all times (T. 130).

ARGUMENT

POINT I

THE EVIDENCE AS A MATTER OF LAW IS INSUFFICIENT TO SUPPORT A CONVICTION OF FORCIBLE SODOMY.

The standard for review of the sufficiency of the evidence for a conviction is that "it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime". State v. Wilson, 565 P.2d 66 (1977).

But when the sufficiency of the evidence is being reviewed in a sex-offense conviction,

> There must be considered the ease of assertion of the forcible accomplishment of the sexual act, with impossibility of defense except by direct denial, or of the proneness of the woman,

> when she finds the fact of her disgrace discovered or likely of discovery to minimize her fault by asserting force or violence, which had led courts to hold to a very strict rule of proof in such cases.
> State v. Horne, 12 Utah 2d 162, 364 P.2d 109 at 112 (1961).

The need for these added considerations in determining the sufficiency of the evidence in a sex-offense is that the uncorroborated testimony of the prosecutrix will be enough to sustain a conviction, State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963). When the conviction is based upon the uncorroborated testimony of a single complaining witness the appellate Court must decide if the "evidence is so inherently improbable as to be unworthy of belief, that upon objective analysis, reasonable minds could not believe beyond a reasonable doubt, defendant was guilty of the offense charged". State v. Mills, 530 P.2d 1272 (Utah, 1975).

The essential elements of the crime of forcible sodomy are given in Utah Code Ann. §76-5-403 (1953 as amended). A person commits forcible sodomy when he engages in any sexual act involving the genitals of one person and the mouth or anus of another person regardless of the sex of either participant, and when that is committed upon another without the other's consent. Consent in a sex offense is defined in Utah Code Ann. §76-5-406 (1953 as amended). The subsections applicable in this case include:

> (1) When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or
> (2) The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution.

Finally, the State has the burden of proving the lack of consent as an element of the crime. State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959).

POINT A

THE PROSECUTRIX'S STORY IS INHERENTLY IMPROBABLE AND BECAUSE THERE IS NO EVIDENCE CORROBORATING HER CLAIM OF A LACK OF CONSENT, THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION AS A MATTER OF LAW.

In this case the appellant was convicted on the uncorroborated testimony of the prosecutrix. But the prosecutrix's testimony is so inherently improbable that it is unworthy of belief. Thus, under State v. Mills, supra, this evidence is insufficient to support a conviction.

The prosecutrix's testimony was replete with inconsistencies and contradictions making her testimony improbable, and consequently unworthy of belief.

The major inconsistencies in the prosecutrix's testimony are those when she described her own condition on the night of the incident. She stated that the reason she would not resist the appellant, by actions or by words, was that she was dizzy (T. 24) and that "I was asleep" and "didn't have any control

over my muscles" (T. 25,26). However, she also stated that just prior to this incident, she was able to walk from appellant's mother's house to the other apartment, she was able to use the bathroom by herself, and after she had slept on the couch, she got off the couch to go to the doorway with him and could walk at that time. In the middle of all of the actions by appellant, the prosecutrix testified she was able to sit up and, that at one point, she grabbed his arm away (T. 27). Also, after they had finished, she walked back into the bedroom by herself. Further, during this time she testified she was too weak and too dizzy to scream or yell out. However, she testified about a continuous conversation with the appellant (T. 27,28).

Because of these inconsistencies in the crucial aspects of her testimony concerning her ability to resist appellant's advances, the prosecutrix's story that the appellant forced her to engage in sodomy without her consent is inherently improbable. Thus without further corroboration, the prosecutrix's testimony of her failure to consent to the sodomy is insufficient as a matter of law to support a conviction.

The prosecutrix testified as to having two small bruises on the inside of her legs, which bruises are consistent with consentual intercourse. Further, the jury found that appellant was not guilty of rape, in that the alleged intercourse was not without prosecutrix's consent. Those bruises are not inconsistent with consentual sodomy as well. There is absolutely no corrobor-

ation in fact of prosecutrix's testimony that she was choked, pushed down hard on the floor, or grabbed by the arms. There is no physical corrobroation of the fact that any intercourse took place, nor that any sodomy took place.

Dr. Evans, who examined the prosecutrix the morning of September 27, 1977, could not testify that the prosecutrix had even engaged in intercourse. He found no evidence of trauma to the genital area, nor to the mouth. He found no bruises or lacerations, or any other physical symptoms of forcible sodomy of intercourse or struggle.

A third fact which prosecutrix testified to, but is uncorroborated by any of the witnesses, is that of the appellant's anger or violence. The prosecutrix in this case is the only person who alleged that the appellant was anything but friendly, cooperative and concerned. Even the prosecutrix's own testimony described him as nice (T. 39) and concerned about her well-being (T. 23). Lisa Don Thornwall testified that the appellant was at all times nice and polite; Preston Truman did not testify to any violent acts by appellant; Diana Visick testified that the appellant expressed concern over the whereabouts of prosecutrix and agreed to begin to help search for her; Detective Pat Smith testified that the appellant was always cooperative and helpful during this investigation. All of these individuals saw the appellant just prior or just subsequently to the events to which the prosecutrix testified. None of these individuals corroborates

her claim that the appellant was very angry or, in fact, violent. Consequently, reasonably minds would entertain a reasonable doubt that the appellant committed the crime. The conviction for forcible sodomy must be reversed.

POINT B

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION AS A MATTER OF LAW BECAUSE LACK OF CONSENT WAS NOT PROVED BEYOND A REASONABLE DOUBT AND THERE WAS NO EVIDENCE OF REASONABLY EXPECTED RESISTANCE TO BE OVERCOME BY FORCE AND THERE WAS NO EVIDENCE OF IMMEDIATE THREATS WHICH WOULD PREVENT RESISTANCE BY A PERSON OF ORDINARY RESOLUTION.

Under Utah Code Ann. §76-5-406 (1953 as amended) a lack of consent may be demonstrated by showing either force that overcomes a reasonable resistance or threats that would prevent resistance by a person of ordinary resolution.

In State v. Horne, supra, the resistance that the law requires a woman make is no "more than her age, strength, the surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest her opposition". Id at p. 111, 112. In that case, the Utah Supreme Court found the facts insufficient as a matter of law to support a convicton. The factors that the Court considered included: (1) during the period of time that the defendant was in her trailer the prosecutrix made no outcry; (2) the prosecutrix did not attempt to leave or seek help during the incident; (3) there was no evidence of marks or bruises; (4) there was no evidence of threats made either upon

the prosecutrix or her children; and (5) the length of time the prosecutrix waited before making a complaint.

During the approximately three hours of interaction between appellant and prosecutrix, prosecutrix made no outcry. Although she testified she was weak, and later that he grabbed her mouth preventing her from screaming, she had been able to carry on a conversation with appellant during the same period of time. Furthermore, because she had walked in that neighborhood prior to being inside of the house, she was aware of the fact that it was a residential neighborhood and that there were houses and people close by in the surrounding area who could have heard the outcry.

Secondly, the prosecutrix had ample opportunities to leave and seek help, but she did not avail herself of such opportunities. She was able to walk around the apartment freely from the time that she got there to the time when she finally left, as evidence by her own testimony. Within the apartment, she was able to walk to the bathroom, she was able to walk around the living room, and she was able to move under her own power to the bedroom. The prosecutrix's claimed that she was restrained at some point by the appellant. However, it should be observed that she performed oral sex upon appellant for one hour without attempting to get away and even when the whole episode was over, she made no attempt to run away.

Thirdly, there was little or no evidence of a struggle.

The prosecutrix testified to two small bruises, which were not observed by the doctor. She had no bruises, no abraisions, no lacerations around the throat or face or the arms where she testified that she was grabbed and choked. She had no marks on her mouth where she said appellant grabbed her. She had no bruises on her back, although she claimed that she was thrown down forcefully on the floor. Prosecutrix admits she did not strike, kick or push away the appellant. She made no attempt at all, in fact, to fight him off. Prosecutrix testified appellant became angry and that made her afraid. She claimed she said "no" to the appellant. At the same time she was saying "no", however, she was also discussing going out to breakfast, which she stated that she suggested to appellant several times. That conversation, combined with the fact that there was no physical resistance, does not provide sufficient evidence to establish that the prosecutrix resisted any force asserted by the appellant, under the circumstances.

Another factor in the Horne case was that there was no evidence that threats had been made. Here, the only claim prosecutrix made of a threat was when she claimed the appellant told her that she would be sorry if she didn't go along with it. This case is distinguishable from State v. Cederstrom, Utah Supreme Court No. 14777 (December, 1977), in that the prosecutrix in Cederstrom claimed that the defendant displayed a knife, a

screw driver, or other similar object when making the threat that she would be hurt. Here no weapon was displayed. No weapon was ever found. In fact, the prosecutrix did not testify that appellant had a weapon or threatened to use a weapon. Similarly, this case is distinguishable from State v. Studham, 572 P.2d 700 (1977). In the Studham case, this Court found several facts which in totality added to the circumstances and sustained the conviction on the grounds that under those circumstances, the prosecutrix had resisted force sufficient to meet the standards in the Horne case. In that case, the evidence showed that the prosecutrix had a young son in the apartment and that she had a bruise or cut on her lip. The prosecutrix had testified that defendant had told her that she would not live to be past the age of twenty-one. The threats, combined with the concern of the safety of the young child and the bruises or cut on her lip, were sufficient to show that the prosecutrix had acted reasonably under the circumstances. This case is distinguishable, however, on several grounds. First of all, the prosecutrix had no young son or other person to protect besides herself. Secondly, prosecutrix did not testify to any threats made by appellant to her. Thirdly, prosecutrix displayed no signs of physical injury or traumas, such that might be expected if one had resisted force. It must be remembered in this case, the prosecutrix is seventeen years old and in reasonably good health. She had not been forced to go any place that she did not want to go.

She was aware of the surrounding area in which these events tood place. Yet in this case, the prosecutrix put up no resistance, physically, and other than the words, "No, I want to go home", gave very little indication of lack of consent. When she agreed to perform oral sex she continued for one hour. All of these factors sustain the implication that if any intercourse or acts of sodomy occurred, they were only with the consent of the prosecutrix under these circumstances.

On the basis of these facts, a reasonable mind would entertain a reasonable doubt that there was a lack of consent on the part of the prosecutrix, and judgment must be reversed.

CONCLUSION

The evidence in this case is insufficient for the appellant to be convicted of forcible sodomy. The appellant made no threat that would have prevented the prosecutrix's resistance. The prosecutrix's lack of consent was not evidence by resistance reasonable for her age, strength, the surrounding facts and attending circumstances. The prosecutrix did not resist in any way reasonably expected under the circumstances. At no time did she make an attempt to leave the residence, nor did she make an attempt to attract the attention of others. At no time prior to sexual intercourse by the prosecutrix's testimony, did she intimate that she did not desire to participate in the act of intercourse. She suffered no cuts, bruises,

or abrasions; she suffered no damage to her clothing as a result of the incident. Consequently, there is a reasonable doubt that the appellant engaged in the act of forcible sodomy.

Respectfully submitted,

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